

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7493

Amended Joint Petition of Ludlow Telephone)
Company, Northfield Telephone Company,)
Perkinsville Telephone Company, Franklin)
Telephone Company, Inc., and Waitsfield-Fayston)
Telephone Company, Inc., d/b/a Waitsfield)
Telecom, d/b/a Champlain Valley Telecom,)
seeking: (1) a temporary restraining order against)
Global NAPs, Inc. ("GNAPs"); (2) payment of)
interexchange access charges by GNAPs; and (3))
revocation of GNAPs' Vermont certificate(s) of)
public good for alleged violations of Vermont law –)

Order entered: 7/2/2009

ORDER COMPELLING DISCOVERY

This Order resolves two motions filed by the Joint Petitioners¹ in this docket to compel discovery responses from Respondent Global NAPs, Inc. ("GNAPs" or "Respondent"). In this Order, I grant all of the Joint Petitioners' requested relief and set a deadline for GNAPS to request a hearing pursuant to V.R.C.P. 37(a)(4) if GNAPs wishes to avail itself of the opportunity to demonstrate the existence of circumstances that would make an award of expenses to the Joint Petitioners unjust.

Background

The Joint Petitioners' first motion was filed with the Public Service Board (the "Board") on May 7, 2009, ("Motion I") seeking to compel answers to five questions initially propounded by the Joint Petitioners to GNAPs on March 30, 2009. The second motion was filed with the Board on June 2, 2009, ("Motion II") seeking to compel answers to eight questions, of which five sought supplemental answers to questions first propounded by the Joint Petitioners to GNAPs on

1. The "Joint Petitioners" collectively comprise Ludlow Telephone Company, Northfield Telephone Company, Perkinsville Telephone Company, Franklin Telephone Company, Inc., and Waitsfield-Fayston Telephone Company, Inc., d/b/a Waitsfield Telecom, d/b/a Champlain Valley Telecom.

March 30, 2009, while the remaining three questions were first propounded on April 17, 2009.² In their second motion, the Joint Petitioners have further requested an award of their reasonable costs and attorneys' fees incurred in preparing Motion II. To date, GNAPs has filed no response with the Board to either Motion I or Motion II.

Discussion

In Vermont, a motion to compel discovery is filed pursuant to V.R.C.P. 37, which provides in relevant part:

A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery . . . if a party fails to answer an interrogatory submitted under Rule 33, or if a person, in response to a request for production . . . fails to produce, the discovering party may move for an order compelling production . . . in accordance with the request.

...

For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.³

Thus, for a motion to compel discovery to be considered properly filed, the motion must satisfy the following predicate elements: (1) reasonable notice to the non-movant that a motion to compel may be filed; and (2) failure of the non-moving party to answer an interrogatory or to respond to a request for production.

I will deal first with the question of whether the Joint Petitioners afforded GNAPs "reasonable notice" of its intent to apply for an order compelling discovery. The affidavit supporting Motion I indicates that GNAPs was advised by counsel for the Joint Petitioners on April 22, 2009, that a motion to compel would be filed unless the Joint Petitioners received a "clear statement" from GNAPs that it would deliver complete answers to the disputed discovery questions by May 5, 2009.⁴ Absent any response from GNAPs by the appointed time, the Joint Petitioners proceeded to file Motion I with the Board two days later, on May 7, 2009.⁵ I find this

2. The discovery questions at issue are: **Motion I:** TDS-Global-1:1; TDS-Global-1:2; TDS-Global-1:7; TDS-Global-1:10; TDS-Global-1:12; **Motion II:** TDS-Global-1:3; TDS-Global-1:5; TDS-Global-1:8; TDS-Global-1:9; TDS-Global-1:11; TDS-Global-2:1; TDS-Global-2:4; TDS-Global 2:5.

3. V.R.C.P. 37(a)(2)-(3). V.R.C.P. 37 is applicable to Board proceedings pursuant to Board Rule 2.214(A).

4. Rule 26(h) Affidavit of Paul J. Phillips, Esq., dated May 6, 2009, at ¶ 11.

5. *Id.* at ¶ 17.

notice reasonable due to the following circumstances: (1) the disputed discovery questions were first propounded to GNAPs on March 30, 2009, and thus have been pending unresolved since then; (2) time was of the essence for the Joint Petitioners to complete discovery or exhaust their procedural remedies in aid thereof, given that the procedural order in this docket established June 2, 2009, as the deadline for the parties to file, if possible, a stipulation of material facts to facilitate a summary resolution of this docket; and (3) GNAPs did not communicate with the Joint Petitioners between April 28, 2009, and May 7, 2009,⁶ to request a scheduling accommodation, nor did GNAPs move for a protective order or for an amendment of any kind to the procedural schedule.

For substantially similar reasons, I find the Joint Petitioners also afforded GNAPs reasonable notice of their intent to file Motion II, which consists largely of a request to compel GNAPs to supplement responses to questions that were first propounded by the Joint Petitioners on March 30, 2009. The requests contained in Motion II were first propounded to GNAPs on April 17, 2009, and time remained of the essence for completing discovery in light of the advancing June 2, 2009, deadline for filing a stipulation of material facts. Between May 5, 2009, and June 2, 2009, counsel for the Joint Petitioners conferred several times with counsel for GNAPs about the incomplete state of GNAPs' responses to the discovery questions at issue in Motion II. At no time during this period did GNAPs move for either a protective order with regard to Motion II or for an amendment of any kind to the procedural schedule. As of June 1, 2009, Joint Petitioners still had not received satisfactory discovery responses from GNAPs. Therefore, late in the evening of June 1, 2009 – on the eve of the June 2, 2009, deadline for filing a stipulation of material facts – GNAPs was advised by counsel for the Joint Petitioners that they "have run out of time waiting for the data responses" and that a second motion to compel would be filed.⁷ Thus, absent any effort by GNAPs to seek an extension of the June 2, 2009, filing deadline in the procedural schedule of this case, I conclude that the Joint Petitioners' actions in affording GNAPs notice on June 1, 2009, of the intent to file a second motion to compel and the

6. *Id.*

7. Rule 26(h) Affidavit of Paul J. Phillips, Esq., dated June 2, 2009, at ¶ 21.

act of doing so the following day near close of business on June 2, 2009, were reasonable under the circumstances.

I turn next to the issue of whether GNAPs has failed to answer questions or produce documents. Having reviewed all of the discovery requests at issue in Motion I and Motion II, it appears from the face of the Joint Petitioners' motions that GNAPs has failed to produce documents and has not answered the propounded questions at issue, choosing instead variously to interpose objections based on relevancy, burdensomeness, or insufficiency of time to respond and assertions that the requests are not reasonably calculated to lead to the discovery of admissible evidence. To date, GNAPs has made no filing with the Board that carries forward or otherwise sets forth any legal or factual support for the objections it has interposed to the Joint Petitioners' discovery requests. Accordingly, I conclude that GNAPs has failed to provide the information and documents requested by the Joint Petitioners in the discovery questions at issue in Motion I and Motion II.

In sum, based on the foregoing analysis, I have determined that both of the Joint Petitioners' motions meet the predicate elements for seeking relief in discovery pursuant to V.R.C.P. 37.

Having established that Motion I and Motion II are properly before me for review, I now examine these motions pursuant to V.R.C.P. 26(b)(1), which provides the controlling substantive legal standard governing the scope and limits of permissible discovery in Vermont.

V.R.C.P. 26 states:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.⁸

8. V.R.C.P. 26(b)(1).

Both of the Joint Petitioners' motions explain in detail how the discovery requests at issue relate to the factual allegations and theories of relief that the Joint Petitioners are pursuing in this docket. Absent any countervailing arguments from GNAPs in opposition to either Motion I or Motion II, I am persuaded that the Joint Petitioners have made a sound, prima facie showing that all of the disputed requests are "reasonably calculated to lead to the discovery of admissible evidence" in this proceeding. Accordingly, I grant Motion I and Motion II, and GNAPs must disclose all of the requested information sought by the Joint Petitioners in response to the questions that are the subject of Motion I and Motion II, respectively.

Finally, I turn to the Joint Petitioners' request in Motion II for an award of their reasonable expenses and attorney's fees associated with bringing that motion. V.R.C.P. 37 provides:

If the motion is granted, the judge shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the judge finds that the opposition to the motion was substantially justified or that other circumstances make an award of expense unjust.⁹

As a preliminary matter, I note that the language of V.R.C.P. 37(a)(4) is mandatory in requiring the court to determine whether to award reasonable expenses and attorney's fees to a prevailing party. Therefore, while the Joint Petitioners have only requested compensation for their reasonable expenses and attorney's fees associated with bringing their second motion, I must also decide the appropriateness of awarding such compensation for the Joint Petitioners' first motion as well.

For the reasons outlined in this Order, I have concluded that the Joint Petitioners are entitled to all of the compulsory discovery relief they have sought. Therefore, if GNAPs wishes to avail itself of the opportunity for a hearing on whether reasonable expenses and attorney's fees shall be awarded to the Joint Petitioners, GNAPs shall file, by July 24, 2009, a request for such a hearing.

SO ORDERED.

9. V.R.C.P. 37(a)(4).

Dated at Montpelier, Vermont, this 2nd day of July, 2009.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: July 2, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)